Supreme Court, U.S.
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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

JAMIE MICHAEL ESCALERA,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND APPELLATE DISTRICT, DIVISION EIGHT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should Certiorari be granted to correct an erroneous application of this court's decisions applying the basic rules of the *Brady* decision by a state court that serves one of the most populated districts in the country, and to clarify the relationship between the concepts of "materiality" and "prejudice" as used in those decisions?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, JAMIE MICHAEL ESCALERA, respectfully prays that a writ of certiorari issue to review the decision of a panel of Division Eight of the California Court of Appeal for the Second Appellate District, affirming the judgment of conviction on one count of second degree murder and one count of attempted manslaughter.

OPINION BELOW

The opinion of the California Court of Appeal, Second Appellate District, Division Eight is an unpublished disposition in case number B175315. The opinion was filed on July 25, 2006. On August 23, 2006, the Court of Appeal denied Petitioner's timely Petition for Rehearing. On November 1, 2006, Petitioner's Petition for Review, exhausting the federal constitutional issue raised in this Petition, was denied without opinion by the California Supreme Court in case number S146340. The opinion of the Court of Appeal affirming the convictions, as well as the Order denying rehearing and the Supreme Court order denying review, are reproduced in the Appendix.

Jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1257, subdivision (a). The order of the State Supreme Court denying discretionary review was entered on November 1, 2006. This Petition is timely filed.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the Sixth Amendment and the due process clause of the Fifth and Fourteenth Amendments and the right to a fair criminal trial, and California Penal Code Sections 187, 192 and 664. Each of the California Statutes is set out in the Appendix.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The federal question presented on this Petition was raised in the trial court on a motion for new trial, and on direct appeal from judgment of conviction in state court.

Petitioner was charged on February 21, 2003, in the Los Angeles County Superior Court, with: one count of first degree murder in which it was alleged he was guilty of the wilful, deliberate and premeditated murder of Donnie Luciano; one count of attempted wilful, deliberate, premeditated murder of Amber Johnson; and one count of being a previously convicted felon in possession of a firearm. He was also charged with personally and intentionally discharging a firearm causing the great bodily injury and death on the victims of the alleged first degree murder and wilful, deliberate, premeditated attempted murder.

The trial court granted Petitioner's motion to bifurcate as to Count 3, a violation of California Penal Code Section 12025(a)(2) [ex-con with a gun]. Petitioner admitted a prior conviction for receiving stolen property and waived the right to have a jury trial on the prior conviction.

The jury did not convict Petitioner of either of the substantive crimes charged, but returned verdicts of guilty of the lesser included offense of second degree murder of Donnie Luciano, and guilty of the lesser included offense of attempted voluntary manslaughter of Amber Johnson, and guilty of the alleged enhancements.

After the verdicts were returned, the prosecutor provided to the defense previously undisclosed documents containing evidence of victim Johnson's prior conviction for a violent crime and her pending charges at the time of the trial.

Petitioner filed a timely Motion for New Trial, alleging that the previously undisclosed documents constituted material favorable evidence under the Due Process Clause within the meaning of that term as used by this Court in *Brady v. Maryland*, 373 U.S. 83 (1963). After a partial hearing on the motion, the court obtained further information, also argued to be material favorable evidence, which had also been available during the trial, and after further briefing and hearing, the motion for a new trial was denied. In denying the motion, the trial judge ruled that although the material was both favorable and "material," failure to produce it was not "prejudicial."

Petitioner was sentenced to a total of 40 years to life. Petitioner thereafter filed a timely Notice of Appeal.

The Appeal was heard by Division 8 of the California Court of Appeal for the Second Appellate District. Petitioner argued on the appeal that "failure to disclose favorable evidence relating to the credibility of a critical trial witness deprived appellant of a fair trial and requires reversal of the judgment."

On July 25, 2006, the Court of Appeal filed its unpublished opinion affirming the judgment in full. (Appendix 1-11)

Petitioner timely sought rehearing in the Court of Appeal, arguing that: (a) "The rule of *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206 [employed for viewing the evidence by

the court of appeal] does not set forth the correct rule for reviewing the record where, as here, the court is evaluating a claim of *Brady* error"; (b) "The court [of appeal] employed the principle of 'prejudice' rather than the proper due process principle (in this context) of 'materiality.'"; (c) "The opinion [of the court of appeal] overlooks the fact that doubts the jury had about the overall prosecution theory of the case, even without the undisclosed evidence that affected Johnson's credibility, and bolstered Appellant's self-defense claim as to her, would likely have been greater and may well have led one or more of the jurors to reach a result more favorable to the Defendant"; and (d) "The opinion fails to view the effect of the withheld evidence cumulatively, and instead discusses it conclusorily and individually, which is contrary to the due process rule as established by the United States Supreme Court."

On August 23, 2006, rehearing was denied without a statement of reasons, or amendment of the opinion. (Appendix 12). Petitioner then timely sought discretionary review in the California Supreme Court, arguing: (a) "Review should be granted to clarify that the rule of *People v. Ochoa*, *supra*, does not set forth the correct rule for reviewing the record where, as here, the court is evaluating a claim of *Brady* error"; (b) "Review should be granted to clarify the concept of 'materiality' in California *Brady* jurisprudence compared to the principle of 'prejudice' used by the court of appeal"; (c) "Review should be granted to validate this court's prior decisions holding that doubts the jury had about the overall prosecution theory of the case renders errors affecting the credibility of the accused vis. the prosecution witnesses more likely to be reversible"; and (d) "Review should be granted to correct the impression held by one of the busiest appellate courts in the state that due process allows a *Brady* error to be

evaluated piecemeal rather than to consider the cumulative effect of the error."

The California Supreme Court denied review without comment on November 1, 2007. (Appendix 13).

The opinion of the Court of Appeal sets out the evidence adequately to frame the federal constitutional issues presented, although it states that in resolving the due process issue raised in this Petition under the decision of this Court in *Brady v. Maryland*, *supra*, and its progeny, it presumed all facts in favor of the judgment, which is not a constitutionally permissible presumption when reviewing an alleged *Brady* violation. This is significant because in assessing the impact of the fact that material favorable evidence was withheld from the accused, a reviewing court must consider all of the evidence, not merely the evidence that supports the judgment of conviction.

SUMMARY OF ARGUMENT

Certiorari should be granted because the Court of Appeal not only erroneously held that reversal was not required because the withholding of material favorable evidence was not prejudicial, it also failed to correctly apply the decisions of this Court dictating the method by which an asserted *Brady* violation is to be decided on appeal. Specifically, the Court of Appeal considered the effect of the failure of the prosecutor to disclose two items of favorable evidence piecemeal, rather than to evaluate the cumulative effect of the error. Moreover, the Court that decided this case is a district of the largest and busiest California Appellate Courts in the state, which serves

the Counties of Los Angeles, Ventura, Oxnard and Santa Barbara, California, and *its* erroneous understanding of fundamental due process rules clearly articulated by this Court in its prior decisions jeopardizes the rights of thousands of litigants to have their constitutional claims adjudicated properly as determined by this Court. Finally, the state Court's use of the concept and term "prejudice" rather than "materiality" suggests that the court below is misapplying the due process test for reversible error based on this Court's definition of "materiality" in *Brady* and its progeny, as discussed in detail below.

ARGUMENT

Certiorari should be granted to correct an erroneous application of this Court's decisions applying the basic rules of the *Brady* decision by a state court that serves one of the most populated districts in the country, and to clarify the relationship between the concepts of "materiality" and "prejudice" as used in those decisions.

Petitioner was charged with the willful, deliberate, premeditated murder of Donald Luciano, which the prosecution referred to as an "execution style" shooting, and the willful, deliberate, premeditated attempted murder of his girlfriend, Amber Johnson.

Petitioner presented the defense of self-defense, based largely on two facts: (1) prior to the shooting, Luciano [the deceased victim of count one] made a conditional threat saying that if a pit bull dog was let into the room ". . . everybody fucking dies."; and (2) Luciano and Johnson were acting in a physically aggressive manner toward Petitioner and the others

in the room and Luciano was wielding a black object and using it to assault Justin Hamrick (also referred to in this brief by his a.k.a. "Houston").[1]

The jury found Petitioner guilty of second degree murder of Luciano and attempted manslaughter of Johnson. In light of the instructions and evidence, the only basis for this verdict was the conclusion that Petitioner acted in the honest but unreasonable belief his actions were required to defend himself.[2]

The people's case depended on two witnesses, Houston and Johnson. The record shows that the People considered Johnson's credibility to be critical to their success for two reasons.

First, Houston made inconsistent statements concerning the events of, and surrounding, the shootings, which undermined his credibility. The opinion below does not mention this fact because it viewed the evidence on this appeal as though Petitioner was challenging the sufficiency of the evidence, which allowed it to ignore conflicts in the evidence. This fact, however, made Johnson's credibility more important to the People's case, because she supported Houston's version of the events.

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[1] This witness is usually referred to as Houston in the record and in the briefs of the People and in argument.

[2] Although an intent to kill is required for first degree murder, second degree murder does not require the intent to kill. Attempted voluntary manslaughter does require an intent to kill. The only circumstances that negate malice when a defendant intends to kill, thereby reducing killing to voluntary manslaughter rather than murder, occur when the defendant acts upon a sudden quarrel or heat of passion on sufficient provocation, or kills in the unreasonable, but good faith, belief that deadly force is necessary in self-defense. *People v. Manriquez*, 37 Cal.4th 547, 583 (2005)

Second, the People considered Johnson's credibility significant enough to make a pre-trial motion to exclude evidence that would have cast doubt on her credibility. The People sought to exclude a screening test that suggested Johnson had ingested LSD on the day she was shot, arguing it would "have a profoundly negative impact" on her testimony. The People were so intent on keeping Johnson's credibility good that they expressed a willingness to conduct a mini-trial during a pre-trial hearing to discount this impeaching evidence.

After the verdict, the People informed the court and defense counsel (for the first time) that: (1) Johnson had previously been convicted of a violent crime against a man; and (2) *at the time she was testifying* (out of custody) there was an active arrest warrant out for her.

The evidence of Johnson's violent prior conviction could well have lead a reasonable juror to conclude that Petitioner's honest belief in the need for self-defense (which is the only possible basis for the jury's verdicts), was also a reasonable one, and thus it might well have resulted in Petitioner's acquittal.

Moreover, Johnson's active outstanding arrest warrant was evidence of a powerful motive for Johnson to please or attempt to please the prosecutor with her testimony against Petitioner, in order to seek favorable treatment in exchange.

The trial judge denied Petitioner relief when this favorable evidence surfaced after the verdict, finding that although it was "material," the jury reached the correct conclusion on the evidence (meaning the conclusion the trial

judge himself would have reached), and thus the state's failure to disclose the evidence sooner was not prejudicial.[3]

The updated Johnson rap sheet and reports provided to the defense after the verdict came in were clearly available to the prosecutor previously – he simply chose not to ask about

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[3] Immediately after ruling on the *Brady* issue, without any break, the court recited its belief in what the true facts of this case are. The court found that there was "no question" that Luciano was the "aggressor", that the motive was the tattoo equipment, and that Petitioner's acts were in response to that aggression by Luciano against Houston.

The court concluded that Petitioner was not truthful in testifying that he found the gun he fired at the scene, but believed he brought it with him to provide protection for Houston, should he be attacked.

This finding helps explain why the court concluded that the impeaching evidence as to Johnson was not important enough to undermine confidence in the outcome. The judge believed the Petitioner lied. But, of course, a reasonable juror, learning that Johnson had motives to lie and was likely lying about not being aggressive toward Petitioner when she rushed him, might also have concluded Petitioner was truthful based on the conflicts between the two. The trial judge simply did not believe this because he concluded Petitioner was not truthful.

Curiously, the trial judge *also* stated that he believed that "the state of mind of the defendant, I believe, was that he honestly in his own mind believed that she was acting aggressively toward him, attacking him, and he shot her." However, the court also declared that "it was known" that she was not armed at the time she was rushing toward him, even though Petitioner testified he believed she was and must have been since Petitioner displayed his own weapon before she moved toward him. The court concluded that if Petitioner honestly believed that, it could not have been a reasonable belief. But this is clearly not the only possible reaction a juror who believes Johnson was a liar and an aggressor might have. A fully informed jury could easily have believed (as the trial judge believed) that Luciano was armed and attacking Houston, that he and Johnson saw the gun he displayed in order to try to stop the attack, and that Johnson was armed when her reaction to that was to aggressively rush toward him. Had the jury so concluded, giving full value to the undisclosed impeaching evidence, it could well have acquitted Petitioner of the shooting of Johnson, and viewed the subsequent shooting of Luciano in a different light, with the only corroborating People's witness as to the events of the Luciano shooting (Johnson), discredited.

But the trial judge did not give serious consideration to that scenario. The trial judge concluded that "under the law" the facts he found equate to one count of murder (of Luciano) and one count of attempted voluntary manslaughter, just as the verdicts reflected.

them until his verdict was secured. He wrote that (immediately after Johnson testified) "with the trial in progress" he was informed that Ms. Johnson had been arrested and was in custody based on a failure to appear on a warrant in Fresno County and he believed there was a body attachment. That was a Friday. The next Monday, he phoned the Fresno prosecutor, but "did not ask the basis for her arrest."

While bad faith need not be proved to establish reversible error based on a *Brady* violation, it seems quite clear here that the prosecutor intentionally did not learn about Johnson's problems in Fresno until there was no danger it would affect the verdict. In his post-trial brief, the prosecutor continued, "After the trial . . . [he] asked Ms. Johnson about the circumstances of her arrest." Upon learning it was for a crime of violence to which she had pled guilty, he ran her rap sheet a second time. He never indicated why he did not do this immediately upon learning that there was an outstanding warrant for her at the time she was testifying, or why he did not ask about the Fresno case until after the trial.

In his description of the domestic violence police reports he obtained after the trial, the prosecutor stated that it was reported that she inflicted a "2-inch cut" to the cheek of her domestic partner during an attack.[4]

The court of appeal apparently felt that the jury either reached the correct conclusion, or reached a conclusion that was more favorable to Petitioner than he deserved, and based on that and an erroneous approach to the *Brady* issue, found that the failure to disclose the evidence was not prejudicial.

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[4] Elsewhere he referred to this as a 2 inch scratch.

The opinion below reaches this conclusion by engaging in a series of legal errors or improper inferences, and by completely misapplying the proper standard of review for an asserted *Brady* violation.

The importance of the testimony of Amber Johnson to the People's case cannot be overstated. She was the named victim in count two, and the People relied heavily upon her testimony to prove this was a case of intentional murder rather than a case of self-defense, as the defense witnesses and Petitioner himself claimed. Despite appropriate and repeated pre-trial requests and motions for discovery of all such evidence, the People withheld (or otherwise failed to produce) complete and accurate evidence of the prior criminal record of arrests and convictions for Amber Johnson until after the trial. The undisclosed information included evidence that she had suffered a conviction for a crime of violence and was on probation during the time of her testimony, and that she knew she had an outstanding warrant for a pending case while she was testifying in this murder trial, and thus had an undisclosed motive to favor the prosecution's version of events.

In addition, the only other witness to the shooting was also a highly motivated person who had given inconsistent statements to the police prior to the trial and at the preliminary hearing, who himself had been threatened with prosecution for the murder in this case. That witness, Justin Hamrick (a.k.a. "Houston"), testified that the deceased, Luciano, had grabbed him in a head lock and was hitting him with a black object and yelling to the other people present in the small apartment where the events in this case transpired that if a pit bull dog was let into the room ". . . everybody fucking dies." It was largely upon this evidence that Petitioner built his self-defense claim because the combination of Luciano's overtly violent conduct

toward Houston, and his threat to kill "everybody," strongly suggested that the black object in his hand was a weapon, and most likely a firearm.

Johnson was Luciano's companion and she rose and rushed toward Petitioner when he produced a gun[5] and effectively warned Johnson and Luciano to back off or desist in the assault of Houston. When Johnson did not back off, but continued to rush him, Petitioner fired a shot at her and ultimately also shot Luciano.

The state argued below that Johnson's credibility was not critical to the prosecution's case, which (they said once the *Brady* issue was raised) was actually based entirely on Houston's testimony. However, the People had charged a first degree, willful, deliberate, premeditated murder which the jury rejected in favor of a second degree murder conviction for the shooting of Luciano, and attempted murder of Johnson, which the jury rejected in favor of an attempted voluntary manslaughter verdict.

One reason for this may have been the conflict between Houston's pre-trial statements and his trial testimony that Petitioner delivered a *coup de tat* shot to the back of the head of Luciano after he was disabled by other shots, and the conflict between this testimony and the expert opinion evidence from the medical examiner to the effect that this alleged final shot to the back of the head did not exist. In other words, Houston's credibility was undermined at trial and it is just as likely that if Johnson had not been convincing in her own testimony, that the jury would have acquitted Petitioner altogether.

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[5] There was a dispute whether this gun was found by him at the scene or on his person.

The failure to disclose material favorable evidence regarding Johnson's credibility at the time of her testimony until after the verdict undermines confidence in the outcome and entitles Petitioner to a new trial under *Brady v. Maryland, supra*, 373 U.S. 83 and its progeny.

In *Kyles* v. *Whitley*, 514 U.S. 419 (1995), this Court confirmed the holdings of the three "prominent" cases "on the way to current *Brady*" law. (514 U.S. at 434). Those three cases are *Brady* v. *Maryland, supra*, 373 U.S. 83, 87 [which held that the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment]; *United States* v. *Bagley*, 473 U.S. 667 (1985) [which addressed the question of materiality]; and *United States* v. *Agurs*, 427 U.S. 97 (1976). "*Brady* held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' 373 U.S., at 87, 83 S.Ct., at 1196-1197; see *Moore* v. *Illinois*, 408 U.S. 786, 794-795, 92 S.Ct. 2562, 2567-2568, 33 L.Ed.2d 706 (1972)."

Brady material includes evidence bearing on the credibility of a witness where the evidence would affect credibility in a way favorable to the defendant. *Giglio v. United States*, 405 U.S. 150, 154 (1972).

Although no "bad faith" or malice on the part of the government needs be proven to establish a violation of the government's due process duty to disclose favorable information to the opposing party, the duty certainly extends to information in law enforcement files of which the prosecutor

becomes aware, or should have become aware during the trial. *Kyles* v. *Whitley*, *supra*, 514 U.S. 419, 437-438.

Brady requires the Government to turn over the evidence in time for it to be of use at trial. The People admitted in post-trial pleadings that they won a conviction, albeit reduced from the charges filed, because "the jury simply did not believe the defendant's . . . account." While it is impossible to know for sure what the jury believed and did not believe about Petitioner's credibility, it is clear that Johnson's testimony favored the People and that the jury's verdict is consistent with a belief that Petitioner honestly but unreasonably believed in the need to use deadly force in self-defense.

In affirming, the Court of Appeal violated several basic rules for reviewing *"Brady"* claims arising under the due process clause where, as here, these claims are based on the failure by the state to disclose material favorable evidence which prejudicially impaired the defendant's right to cross-examine a victim/eyewitness, and his right to present evidence, all protected by the Sixth Amendment to the United States Constitution.

The court below did not address whether or not the state had a duty to reveal the evidence which was not disclosed, but concluded that "there is a requirement of prejudice." (App. 9) The Opinion goes on to view the record in the light most favorable to the prosecution – which is not appropriate in reviewing a *Brady* claim, and then, interpreting the evidence in the way that would be most favorable for the prosecution, concludes that if it had been disclosed, it would not have changed the outcome of the case.

In reaching this conclusion, the opinion does not address in any regard authority cited by Petitioner that holds that where the jury did not accept the prosecution's case in toto, errors affecting credibility of a victim or witness are almost always prejudicial, and it did not acknowledge that the jury could well have given this withheld favorable evidence far greater weight and significance than did the panel deciding the appeal.

Certiorari should be granted because: (a) the Court of Appeal erroneously viewed the record in the light most favorable to the prosecution under a state Supreme Court decision, which is not the appropriate approach for a reviewing court which is evaluating a due process (*Brady*) error, but is to be used only when the Petitioner claims the evidence is insufficient to establish each element of the crime charged; (b) the court employed the principle of "prejudice" rather than the proper due process principle (in this context) of "materiality"; (c) the Opinion overlooks the fact that doubts the jury had about the overall prosecution theory of the case even without the undisclosed evidence that affected Johnson's credibility, and bolstered Petitioner's self-defense claim, would likely have been greater and may well have led one or more of the jurors to reach a result more favorable to the Defendant; and (d) the opinion fails to view the effect of the withheld evidence cumulatively, and instead discusses it conclusorily and individually, which is contrary to the due process rule as established by this Court.

The opinion below states: "Viewed in accordance with the governing rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), that evidence at trial showed that . . ." (App. 2) This is not the correct rule for viewing the evidence where, as here, the issue is a due process violation

under *Brady v. Maryland*, *supra*. Rather, *that* standard, enunciated by the California Supreme Court in *Ochoa*, is proper for viewing the evidence in a case in which the Petitioner raised the due process issue of insufficiency of the evidence to establish each element of the crime charged. There (i.e., 6 Cal.4th at p. 1206), the state Supreme Court wrote: "We first observe that our role on appeal is a limited one. 'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" *People v. Ochoa*, *supra*, 6 Cal.4th 1199, 1206.

In evaluating a claimed *Brady* error, on the other hand, this Court has held that "that the omission must be evaluated in the context of the entire record." *United States v. Agurs*, *supra*, 427 U.S. 97, 112. More recently, this Court echoed this rule in *Kyles v. Whiteley*, *supra*, 514 U.S. 419, 440, in the majority opinion concurred in by five Justices. In the dissenting opinion, the remaining Justices agreed with this approach: "Before proceeding to detailed consideration of the evidence, a few general observations about the Court's methodology are appropriate. It is fundamental to the discovery rule of *Brady v. Maryland, supra*, 373 U.S. 83, that the materiality of a failure to disclose favorable evidence 'must be evaluated in the context of the entire record.' " 514 U.S. at 460 (Dissenting Op. of Scalia, J.)

Finally, an examination of the discussion by the majority in *Kyles*, of the trial evidence, shows without question

that this Court did not evaluate or view the record as it would in a sufficiency of the evidence case.[6]

The error in applying the wrong view of the evidence pre-ordained the erroneous result reached here. By viewing the evidence in the light most favorable to the prosecution, the rest of the opinion dismisses as unimportant each and every individual favorable effect of the evidence which the prosecution did not disclose to defense counsel. (See App. 10-11.)

Certiorari should be granted, if for no other reason than to correct the erroneous practice in the California courts of evaluating a *Brady* claim under a view of the evidence that presumes the facts supporting the conviction to be correct, because applying this standard violates this Court's holdings to the contrary, holding claimed *Brady* violations should begin by viewing all of the evidence under the proper standard, and not by merely "view[ing] the evidence in the light most favorable to the People" or presuming "in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence", as the opinion below states it did.

In addition, the opinion of the court of appeal cited *Strickler v. Greene*, 527 U.S. 263, 280 (1999), for the proposition that a *Brady* violation requires a showing of "prejudice."

However, the Court in *Greene* dealt with a far different procedural situation from the one presented here. For it was considering the federal habeas corpus standard for giving relief

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[6] 514 U.S. at pp. 423 et seq. [discussing the fact that there are conflicts in the evidence and inconsistencies, which would be irrelevant under the *Ochoa* standard applied by the court of appeal in the present case.]

on a defaulted claim, known as the "cause and prejudice" standard. Much of the Court's discussion about "prejudice" appears to be the prejudice a habeas petitioner must show under that concept, not relevant here. In fact, in its final concluding sentence, the majority opinion actually distinguishes "materiality" (which is the standard for finding a *Brady* violation) and "prejudice." "He therefore cannot show materiality under *Brady* or prejudice from his failure to raise the claim earlier." *Strickler v. Greene, supra*, 527 U.S. at 296.

In *Greene*, the two tests converged, and failing to prove one ("prejudice") was equal to failing to prove the other ("materiality"), however, *Greene* did not purport to change that test or any other feature of *Brady* jurisprudence.[7]

Moreover, in *Greene*, this Court quoted the exact test cited by Petitioner for the definition of the "materiality" element in a *Brady* case, as follows:

> "[Petitioner] must convince us that 'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense. As we stressed in *Kyles:* '[T]he adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a

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[7] "Because our opinion does not modify *Brady*, we reject respondent's contention that we announce a "new rule" today. See *Bousley v. United States*, 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998)." *Strickler v. Greene, supra*, 527 U.S. at 289, n. 35.

> verdict worthy of confidence.' 514 U.S., at 434, 115 S.Ct. 1555.
>
> " ' The Court of Appeals' negative answer to that question rested on its conclusion that, without considering Stoltzfus' testimony, the record contained ample, independent evidence of guilt, as well as evidence sufficient to support the findings of vileness and future dangerousness that warranted the imposition of the death penalty. The standard used by that court was incorrect. As we made clear in *Kyles*, the materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. *Id.*, at 434-435, 115 S.Ct. 1555. Rather, the question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' *Id.*, at 435, 115 S.Ct. 1555." *Id.*, 527 U.S. at pp. 289-290.

Petitioner submits that the approach taken by the court below was precisely that approach rejected by this Court in *Greene*, because it amounts to asking whether "after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions." The opinion seems to have concluded that the jury got it wrong in not convicting Petitioner of a greater

crime,[8] and that view of the evidence, rather than an evaluation of what the jury, which saw the case as weaker and different than the prosecution saw it, would probably have done if *it* had heard the withheld exculpatory evidence, determined the erroneous result reached. This is not the correct approach to evaluating a *Brady* claim, under any authority.

Certiorari should be granted to ensure that California courts apply the correct standard when reviewing important federal constitutional issues under the proper standard.

In its analysis of whether failure to disclose the impeaching evidence regarding Johnson's prior conviction for a violent crime, and her unique position vis. her then current pending failure to appear charges was "prejudicial," the opinion below also overlooks the fact that unlike the appellate panel (which apparently believed the jury should have convicted Petitioner of the crimes charged), the jury only convicted on the lesser crimes reflected in the verdicts.[9]

However, where, as here, the verdicts reflect a selective belief in the prosecution evidence, the erroneous exclusion or suppression of impeachment evidence of one of the prosecution's star witnesses (i.e., Johnson) should not be viewed as "harmless" error, or of no consequence.

It was for the jury, not the Court of Appeal, to determine which version of the facts was more likely to be correct, and it was for the jury to determine whether or not it harbored a reasonable doubt about the state's proof.

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[8] See App. 11 ["Under the evidence and the law, that verdict was the most, if not more than Petitioner could properly have received."]

[9] See n. 7.

Since Houston's testimony was significantly discredited, the verdict of guilty rested almost entirely on Johnson's credibility. That verdict rested on the jury's obvious conclusion that while Petitioner had an honest belief in his need to act in self-defense, that belief was unreasonable. But *this* conclusion was consistent with Johnson's testimony as to her own actions and regarding the movements of the others in the room.

Clearly, the inference of the court below that impeaching Johnson was of no import, is erroneous because it ignores the fact that the jury had a substantially different view of the evidence then the prosecution (or the court of appeal itself) had, and that under that view, Johnson's credibility was indeed critical. Had the jury disbelieved Johnson, it would likely have acquitted Petitioner altogether, because the second degree murder conviction and the attempted manslaughter conviction were based solely on the reasonableness vel non of Petitioner's conduct, in light of his testimony and Johnson's contrary testimony, un-impeached with the evidence that was withheld by the prosecution.

The only discussion in the opinion below that approached this aspect of Petitioner's materiality (or "prejudice") argument is a statement that "All of the other eyewitnesses testified that Johnson had indeed charged in Appellant's direction and the jury of voluntary manslaughter implies that the jury found her shooting an act of imperfect (unreasonable) self-defense, which meant that they too believed she had charged Appellant." (App. 11.) While true, this statement overlooks the fact that if the jury had grave doubts about Johnson's credibility, it may well have believed that Petitioner was reasonable in his belief and thus acquitted altogether.

This passage also implies that there were a large number of "other eyewitnesses," which is clearly not the case. Rather, there were only three surviving witnesses to the shootings: Houston, Petitioner, and Johnson.

Moreover, the significance of Johnson's credibility did not stand or fall on whether the jury believed she charged at Petitioner, but whether or not they believed that he reasonably concluded she was endangering his life. Clearly, the opinion never addresses the impact of evidence damaging Johnson's credibility on that conflict between Johnson and Petitioner, and just as clearly, this is not a case where there was a large number of eyewitnesses to corroborate Johnson, making any withheld evidence bearing unfavorably on her credibility unimportant to the outcome. Clearly, contrary to the opinion, if the record is viewed in its entirety, rather than in a light most favorable to the verdict, the fact underling Johnson's opinion not only would "have supported Petitioner's position that she was coming at him when he shot her," but would also have supported his position that she was doing so in a manner that gave rise to a right on his part to defend against an attack likely to result in great bodily injury or death.

Finally, the opinion fails to view the effect of the withheld evidence cumulatively, and instead discusses it conclusorily and individually, which is contrary to the due process rule as established by this Court.

In its analysis of the *Brady* claim, the Court of Appeal used a divide and conquer approach to evaluating whether or not the failure to disclose this evidence at a time when it would have been useful to Petitioner was prejudicial.

This flies in the face of the proper approach to the evaluation of a *Brady* claim. When weighing the effect of the undisclosed evidence, that evidence is considered cumulatively for its impact and not individually. (*Kyles v. Whitley*, *supra*, 514 U.S. 419, 436 ["The fourth and final aspect of *Bagley* materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item by item." *Kyles*, *supra*, at p. 436].

A review of the short discussion of the impact of the undisclosed evidence in the opinion of the court of appeal (at App. 9-10) reveals that it set up one aspect of the materiality posited by Petitioner at a time, and knocked them down individually, viewing the entire case as though the People had actually proved an execution murder and attempted murder, despite the jury's verdicts to the contrary, and despite the constitutional requirement that the effect of non-disclosure must be weighed on a cumulative basis, viewing the entire record.

Viewed cumulatively, it is clear that the withheld evidence was prejudicial to Petitioner's right of confrontation because it was "material" as that term in used in the *Brady* cases to Johnson's credibility and to the weight the jury would afford her testimony.

By withholding disclosure, Petitioner was deprived of *both* the opportunity to impeach Johnson with readiness to do evil on the occasion of her prior conviction, and deprived Petitioner of the ability to cross-examine her about her motive to please the prosecution with the arrest warrant and Fresno body-attachment looming. Thus, Petitioner was deprived of a general challenge to Johnson's credibility, related to her violent nature in contrast to her self-portrayal as meek and frightened,

and to challenge her motives for lying that were based on her then-existing problems in Fresno. Petitioner's ability to cross-examine Johnson by confronting her with her prior violence and her motive to favor the prosecution, neither of which were known to the jury, was completely cut off.

That deprivation also deprived him of the ability to argue the affect of this impeachment evidence on Johnson's and Petitioner's credibility to a jury.

Given the fact that this case turned almost entirely upon the credibility of Petitioner, who testified that he shot Johnson (once) and Luciano (to death) out of fear and in self-defense, and given the fact that the only other percipient witness who conflicted in important respects with Petitioner's testimony was Houston, a thoroughly discredited witness who himself had been threatened with arrest as an accomplice in these charges, the suppression of evidence the trial court correctly found to be admissible, material impeachment, requires reversal because Petitioner was deprived of a trial that comports with fundamental fairness and due process.

The right to confrontation enshrined in the Sixth Amendment includes the right to cross-examine adverse witnesses. *Davis v. Alaska*, 415 U.S. 308, 315-317 (1974). The right to cross-examine, in turn, ensures a defendant's opportunity to demonstrate any possible bias in the adverse witness, as well as his motivation for testifying. (*Davis v. Alaska*, *supra*, 415 U.S. at 316-317.) "The partiality of a witness . . . is always relevant as discrediting the witness and affecting the weight of his testimony." Wigmore, Evidence, § 940, at 775 (Chadbourne rev. 1970.)

A confrontation clause violation occurs when the defendant is prevented from investigating "a prototypical form of bias" if the jury "might reasonably have found that it furnished the witness a motive for favoring the prosecution in his testimony." *Delaware v. Van Arsdall*, 475 U.S. 673, 679-680 (1986). Accordingly, to be permitted, the cross-examination need not be certain to affect the jury's assessment of the testimony.

In addition, although a trial judge has discretion in determining the extent of cross-examination, limitations on cross-examination "cannot preclude a defendant from . . . [making] a record from which to argue *why* the witness might have been biased." *Davis*, 415 U.S. at 318. In any event, the trial judge here ruled that the evidence was material and would have been admissible to impeach Johnson.

The denial of this right is reversible error where the jury likely would have received a "significantly different impression" of the credibility of the witness. *Delaware v. Van Arsdall*, *supra*, 475 U.S. 673, 681. Here, clearly, it is likely that the jury would have received a significantly different impression of Johnson if it had heard that she was not the meek and frightened female she portrayed herself to be, but that she had attacked a man and drawn blood, leading to her prior conviction for a violent crime.

In addition, the People's statement that the jury did not believe Petitioner's account was prophetic because it could only have disbelieved it based on the credibility of Houston and Johnson. Since Houston was himself impeached thoroughly by his own inconsistent statements and by the fact that he was a suspect in this same crime, but then became a People's witness instead, Johnson's desire to avoid punishment

for her failure to appear and her charged probation violation, on which charges she was wanted for arrest, could very well have led a jury to totally reject the credibility of the entire People's case.

The harmless beyond a reasonable doubt standard was applied by this Court in *Van Arsdall*, and the Court stated, referring to its previous decision in *Davis* where the Court did not explicitly state what standard it was applying: "This Court reversed Davis' conviction, emphasizing that Green's testimony was 'crucial' and that there was a 'real possibility' that pursuit of the excluded line of impeachment evidence would have done '[s]erious damage to the strength of the State's case.' *Id.*, at 319, 94 S.Ct., at 1112. So despite the absence of a reference to *Chapman v. California*, 286 U.S. 18, 25 (1967), *Davis* plainly rests on the conclusion that on the facts of that case, the error might well have contributed to the guilty verdict. *Davis* should not be read as establishing, without analysis, a categorical exception to the harmless-error rule." at p. 683.

In the present case, the court below did not consider whether the error in failing to disclose information to the defense which could have been used both to impeach Johnson, and to establish a real tangible and present bias in favor of the prosecution beyond that which the jury was already aware of, also "might well have contributed to the verdict."

Because the suppression of material favorable impeaching evidence substantially impacted on Petitioner's ability to effectively cross-examine Johnson, and because that suppressed evidence might well have contributed to the verdicts against Petitioner, the *Brady* violation here clearly required reversal.

Certiorari should be granted because the California courts are applying this Court's precedents regarding the way to view the evidence on a *Brady* claim, the definition of "materiality" and the approach to assessing the impact of the withheld evidence (cumulatively, rather than individually) improperly.

CONCLUSION

For all these reasons, this Court is urged to grant the writ and reverse the judgment of the Court of Appeal affirming Petitioner's convictions.

WHEREFORE, Petitioner prays that this Honorable Court grant his Petition and issue its Writ of Certiorari.

Respectfully submitted this 26th day of January 2007.

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